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In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

ROBERTA DELANEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Clean Air Act authorizes a court of appeals, in a proceeding reviewing agency action, to order the Administrator of the Environmental Protection Agency to prepare a "federal implementation plan" within a specified time period.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners before the court of appeals were Roberta Delaney, Gayle Hartmann, David Horley, Alama Williams, Maureen Mageau-Decindis and Brian McCarthy. The respondents before the court of appeals were William K. Reilly, Administrator of the Environmental Protection Agency (EPA), and EPA. The State of Arizona intervened in the court of appeals in support of the Administrator and EPA.

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No.

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

ROBERTA DELANEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of William K. Reilly, Administrator of the Environmental Protecton Agency (EPA), et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 898 F.2d 687.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 18a) was entered on March 1, 1990. A petition for rehearing was denied on May 16, 1990 (App., *infra*, 17a). On August 9, 1990, Justice O'Connor extended the time for filing a

petition for a writ of certiorari to and including September 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set out in the appendix to this petition. See App., *infra*, 19a-22a.

STATEMENT

The Clean Air Act, 42 U.S.C. 7401 *et seq.*, provides two basic avenues to obtain judicial relief relating to EPA's implementation of the Act. Section 307(b)(1) authorizes the courts of appeals to review—and if necessary reverse—various actions of the Administrator. 42 U.S.C. 7607(b)(1). Section 304(a)(2), by contrast, authorizes the district courts to compel agency action where "there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. 7604(a)(2). In this case, respondents commenced an action against the Administrator under Section 307 of the Clean Air Act challenging his approval of the State of Arizona's revisions to its state implementation plan. The court of appeals held that the Administrator's action was, in certain respects, arbitrary and capricious, and it reversed the Administrator's approval. The court of appeals also went one step further and ordered the Administrator to promulgate a "federal implementation plan"—to replace the disapproved state plan—within six months. The question presented is whether the court of appeals has authority to impose that requirement, which seriously impairs the Administrator's ability to carry out his responsibilities under the Act.

1. The Clean Air Act creates a comprehensive national program for combatting pollution. The basic structure of the present Act was established by the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, and is set out in Sections 109 and 110 of the present Act. Congress charged the Administrator of EPA with developing "national * * * ambient air quality standards" (NAAQS). § 109(a), 42 U.S.C. 7409(a). Congress then required each State to develop and submit to EPA, within nine months after promulgation of the NAAQS, a state implementation plan (SIP) to achieve and maintain the NAAQS within the State. § 110(a)(1)(A), 42 U.S.C. 7410(a)(1)(A). The Administrator was required to determine whether each SIP met certain statutory requirements, including the attainment of applicable "primary" NAAQS, as "expeditiously as practicable" but generally not later than three years from the date of approval of the SIP. § 110(a)(2), 42 U.S.C. 7410(a)(2). If a State failed to submit a SIP, or if the Administrator determined that the SIP failed to meet the Clean Air Act's requirements, the Administrator was empowered to promulgate his own plan (a federal implementation plan or FIP) for the State. § 110(c)(1), 42 U.S.C. 7410(c)(1). See generally *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2530 (1990).

In 1977, Congress amended the Clean Air Act to respond, in large part, to the States' widespread failure to meet the attainment dates of the 1970 Amendments. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. The 1977 Amendments retained much of the structure of the 1970 Amendments, but they also created the concept of a "nonattainment area"—an area where air quality falls short of NAAQS. § 171, 42 U.S.C. 7501. The 1977 Amendments required each State containing a nonattainment area to prepare and secure EPA approval of a new

SIP by July 1, 1979. §§ 110(a)(2)(I), 172(b), 42 U.S.C. 7410(a)(2)(I), 7502(b). Congress extended the deadline for attainment of the primary NAAQS in a nonattainment area to December 31, 1982. § 172(a)(1), 42 U.S.C. 7502(a)(1). Further extensions were permitted for "photochemical oxidants" (ozone) and carbon monoxide, but only if the State demonstrated that attainment was not possible by 1982, despite the implementaion of all reasonably available measures, and that attainment would be achieved "as expeditiously as practicable but not later than December 31, 1987." § 172(a)(2), 42 U.S.C. 7502(a)(2). The 1977 Amendments retained the provisions requiring the Administrator to promulgate a FIP if the State failed to submit an adequate SIP. See § 110(c)(1), 42 U.S.C. 7410(c)(1). See generally *General Motors*, 110 S. Ct. at 2530.

As we have noted, the Clean Air Act provides aggrieved persons with two forms of judicial relief. First, Section 307(b)(1) authorizes a court of appeals to review, and if necessary reverse, various actions of the Administrator, including "the Administrator's action in approving or promulgating any implementation plan" for achieving the Act's ambient air quality standards. 42 U.S.C. 7607(b)(1). See also 42 U.S.C. 7607(d). Section 307(e) states that "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. 7607(e). Second, Section 304(a)(2) provides that a person may commence a civil action in a district court against the Administrator of EPA where "there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. 7604(a)(2). The district court has jurisdiction "to order the Ad-

ministrator to perform such act or duty, as the case may be." 42 U.S.C. 7604(a).

2. This case arises from a challenge by respondents—a group of Arizona citizens—to the Administrator's approval of Arizona's state implementation plan for portions of Maricopa and Pima Counties. In 1978, EPA designated parts of those counties (which embrace, respectively, Phoenix and Tucson) as nonattainment areas for carbon monoxide. In 1979, Arizona submitted SIP revisions for both areas and applied for an extension of the 1982 attainment deadline to 1987. In 1982, the Administrator gave conditional approval to Arizona's SIP revisions. Three years later, respondents filed an action against the Administrator in district court, under Section 304(a)(2) of the Clean Air Act, to obtain an order declaring the Arizona SIP revisions inadequate and requiring EPA to perform its "non-discretionary" duty to prepare a FIP for Maricopa and Pima Counties (*McCarthy* v. *Thomas*, No. 85-CV-344 (D. Ariz.) (complaint filed Apr. 8, 1985)). See App., *infra*, 3a.[1]

Upon the agreement of the parties, the district court entered an order staying the suit until January 1, 1987. See *McCarthy* v. *Thomas, supra* (order filed Feb. 19, 1986). In late 1986, the Administrator denied Arizona's application for a deadline extension, revoked its 1982 conditional approval, and ultimately did not approve Arizona's subsequent SIP revisions. See App., *infra*, 3a.[2] The district court subsequently ordered the Administrator to prepare a FIP no later than six months after September 30, 1987, unless, before that date, Arizona submitted and the Ad-

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[1] The court of appeals incorrectly suggested that respondents filed their district court action at a later date. See App., *infra*, 3a.

[2] See *Arizona* v. *Thomas*, 829 F.2d 834 (9th Cir. 1987); see also *Arizona* v. *Thomas*, 824 F.2d 745 (9th Cir. 1987).

ministrator approved adequate SIP revisions. *McCarthy* v. *Thomas, supra* (order filed Aug. 11, 1987). The court later extended that deadline to August 10, 1988. *McCarthy* v. *Thomas, supra* (order filed Apr. 19, 1988). Arizona submitted SIP revisions and the Administrator ultimately approved them on August 10, 1988. See App., *infra*, 3a.

Respondents then brought the present action in the court of appeals, under Section 307(b)(1) of the Clean Air Act, challenging the Administrator's approval of Arizona's SIP revisions. The court of appeals granted the petition for review and vacated the Administrator's approval. The court first overturned the Administrator's determination that the nonattainment areas are entitled to take three years, from the date of SIP approval, to come into compliance. The court held that, where a state has failed to meet Congress's 1982 attainment deadline, the SIP must provide for attainment "as soon as possible." App., *infra*, 4a-8a. The court next rejected, as "arbitrary and capricious," the Administrator's failure to require adoption of a number of air pollution control measures that, in the court's view, EPA guidance documents presume are "reasonably available." The court stated that under EPA's guidelines Arizona must bear the burden of demonstrating that the measures would not accelerate the projected attainment date. *Id.* at 8a-11a. The court also rejected, as arbitrary and capricious, the Administrator's determination that the Maricopa County SIP revisions contain adequate "contingency" and "conformity" provisions. *Id.* at 11a-13a. The court denied relief on respondents' other challenges to the SIP revisions. *Id.* at 13a-16a. In the concluding paragraph of its opinion, the court stated:

> We vacate the EPA's approvals of Maricopa and Pima counties' Clean Air Act implementation plans.

> We direct the EPA to disapprove these plans and to promulgate federal implementation plans consistent with this opinion within six months.

Id. at 16a.

The government filed a petition for rehearing and a suggestion of rehearing en banc limited to the question of the court of appeals' relief.[3] The government urged that the court of appeals lacked authority to order EPA to promulgate a FIP and that the six-month deadline for FIP promulgation was inconsistent with the statute and unreasonable. On May 16, 1990, the court of appeals denied the petition without opinion. App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

As this Court recently explained, the Clean Air Act provides specific, carefully crafted remedies for agency inaction, and the courts do not have license to supplant the statutory remedies with judicially created ones. See *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2533-2534 (1990). That reasoning applies with equal force in this case. Section 307 of the Clean Air Act authorizes the court of appeals to review and, if necessary, reverse the Administrator's approval of Arizona's SIP revisions. The court had no authority, however, to take the further step of ordering the Administrator to promulgate a FIP within a specified time period. This Court's decision in *General Motors* specifically identified Section 304 of the Clean Air Act, which authorizes the district courts to compel agency action, as the appropriate source of judicial relief in the event that the Administrator fails to perform a non-discretionary duty. The court of appeals did not have the benefit

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[3] Similarly, in this Court, we do not seek review of the court of appeals' determinations as to the adequacy of Arizona's SIP revisions.

of this Court's *General Motors* decision at the time it entered its decision. We therefore suggest that this Court grant our petition, vacate the court of appeals' judgment insofar as it orders the Administrator to prepare a FIP within a specified time period, and remand the case for further consideration in light of that decision. In the alternative, we urge this Court to reverse summarily the court of appeals' judgment insofar as it orders inappropriate relief.

1. In *General Motors*, the petitioners argued that EPA's failure to approve a State's SIP revisions in a timely manner barred EPA from enforcing the provisions of an existing SIP. This Court rejected that contention, holding that Congress did not intend to bar EPA enforcement suits in those circumstances and that the courts have no authority to impose such a bar. 110 S. Ct. at 2533-2534. The Court explained that the Clean Air Act provides "statutory remedies * * * when EPA delays action on a SIP revision" and that courts accordingly should not create other remedies in their stead. *Id.* at 2534. The Court specifically stated that "the statutory remedies for EPA inaction include a suit to compel agency action under § 304(a)(2)." *Id.* at 2534 n.4. As we have explained, Section 304 authorizes a district court to order the Administrator to perform non-discretionary duties. See 42 U.S.C. 7604.

The Court's decision in *General Motors* arose in the context of an EPA enforcement suit, brought under Section 113(b) of the Act (42 U.S.C. 7413(b)), against a pollution source. The Court's reasoning, however, is equally applicable in this case. Here, respondents brought a Section 307 suit seeking judicial review of the Administrator's approval of Arizona's SIP revisions. Section 307 authorizes a court of appeals to review, and, if necessary, reverse, the Administrator's approval. Once the court of

appeals reversed the Administrator's action, however, that court's reviewing function was at an end. The court had no authority to require EPA to promulgate a FIP within a specified time period. Section 110(c) sets forth the Administrator's obligations in the event a State's proposed SIP revisions are rejected. See 42 U.S.C. 7410(c). If the Administrator fails to fulfill his statutory obligations, respondents have a remedy. As *General Motors* indicates, they may bring a Section 304 suit to compel the Administrator to perform a non-discretionary duty.

Indeed, the principle recognized in *General Motors* applies with even greater force in this case. As an initial matter, the court of appeals was not entitled to presume that the Administrator would fail to promulgate a FIP in a timely manner. See *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965) (administrative agencies are entitled to the presumption "that they will act properly and according to law"). See also, *e.g.*, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971). Additionally, Congress has not given the courts of appeals jurisdiction to provide a remedy for the Administrator's failure to perform a non-discretionary duty; to the contrary, Congress's remedy, set forth in Section 304, lies strictly in the district courts. Moreover, the Clean Air Act's carefully crafted provisions for judicial oversight are themselves drawn from settled principles of administrative law.

This Court has consistently recognized that once a reviewing court finds an agency's action invalid and sets it aside, the court's reviewing function is at an end and the matter returns to the agency for further appropriate agency action. The Court stated the "guiding principle" nearly 40 years ago:

> [T]he function of the reviewing court ends when an

> error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.

FPC v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).[4] The Clean Air Act's judicial review provisions employ this principle. Secion 307 empowers the reviewing court—in this case the court of appeals—to review and, if necessary, reverse agency action, but it does not give the court power to direct the agency's subsequent activities on remand. As the Court has recognized, an agency's task on remand remains "infused with judgment and discretion, requiring the ' "accommodation of conflicting policies that were committed to the agency's care." ' " *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990). "It is not a task [courts] ought to undertake on the agency's behalf in reviewing its orders." *Id.* at 1630. See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 144 (1940).

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[4] See *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 140-146 (1940). This Court has repeatedly followed that principle. For example, the Court concluded in *FPC* v. *Transcontinental Gas Pipe Line Co.*, 423 U.S. 326 (1976), that a lower court, by ordering an agency to complete an investigation within 30 days, had "overstepped the bounds of its reviewing authority." *Id.* at 329-330, 331. The Court explained that

> a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency.

Id. at 333. See also, *e.g.*, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-525 (1978). Similarly, when this Court recently held that the Federal Labor Relations Authority erred in its application of certain provisions of the Civil Service Reform Act, the Court refused to adopt a "permissible" alternative interpretation because the agency had not considered the interpretation "in the first instance." *Department of the Treasury* v. *FLRA*, 110 S. Ct. 1623, 1629 (1990).

The court of appeals' requirement that the Administrator develop a federal implementation plan within six months, like the enforcement bar in *General Motors*, was apparently intended to motivate prompt agency action.[5] The Clean Air Act contains other provisions, however, to ensure that the Administrator acts with appropriate dispatch. As the Court noted in *General Motors*, Section 304 authorizes interested citizens to bring suit against the Administrator "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 42 U.S.C. 7604(a)(2). See 110 S. Ct. at 2534 & n.4. Significantly, however, such suits must be brought in a district court, which—unlike a court of appeals—has the factfinding capabilities necessary to investigate the reasons for the agency's inaction, to determine an appropriate remedy and its timing, and to modify the remedy to the extent that changed circumstances dictate. Congress was careful to give the courts of appeals power over those matters that require judicial review of completed agency action, while conferring authority on the district courts as to those matters requiring the exercise of factfinding and enforcement powers. The court of appeals' decision in this case, which would require that court to assume the factfinding role of a district judge, upsets Congress's carefully drawn distinction.[6]

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[5] The court's concern in understandable. Arizona repeatedly has failed to meet the Clean Air Act's deadlines for attainment of the NAAQS. But Arizona is not alone. Indeed, the problem of continuing nonattainment, now as in 1977, is an important legislative topic. Congress is presently considering revisions to the Clean Air Act that will address that matter. See S. 1630, 101st Cong., 2d Sess. (1990) (The Clean Air Act Amendments of 1990).

[6] The courts of appeals have repeatedly recognized the Clean Air Act's bifurcated system for judicial oversight of the agency's imple-

2. Although the legal objection that we present in this petition is narrow, it raises a matter of great practical importance. The court of appeals' requirement that the Administrator promulgate a FIP within a specified time period places severe limitations on the Administrator's ability to exercise "judgment and discretion" (*FLRA*, 110 S. Ct. at 1629) in formulating a legally adequate FIP. The court of appeals' six-month deadline is not required by statute and was formulated without regard to (or even significant inquiry into) what the development of a FIP entails. The Administrator is moving resolutely to meet the court of appeals' six-month deadline. That deadline, however, has required a redirection of EPA's limited resources during a period of serious budgetary constraints and has hampered the Administrator's ability to exercise considered judgment in a sensitive matter of joint federal-state concern.[7]

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mentation of the Act. See *Maine* v. *Thomas*, 874 F.2d 883, 884 (1st Cir. 1989); *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, 896 (2d Cir. 1989); *Sierra Club* v. *Thomas*, 828 F.2d 783, 787 (D.C. Cir. 1987); *Indiana & Michigan Elec. Co.* v. *EPA*, 733 F.2d 489, 490-491 (7th Cir. 1984). The Ninth Circuit has itself noted that the Act assigns separate roles to the courts of appeals and the district courts. See *Farmers Union Central Exchange, Inc.* v. *Thomas*, 881 F.2d 757, 760 (1989); *Abramowitz* v. *EPA*, 832 F.2d 1071, 1075 (1987). See also *Kamp* v. *Hernandez*, 752 F.2d 1444, 1454 (1985); *Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349, 1353 (1978).

[7] The court of appeals' mandate issued on May 25, 1990, and the Administrator accordingly is under an obligation to complete the promulgation of the FIP by November 26, 1990. The agency has conducted new air quality modeling for the affected regions, which entails the use of data on emissions and pollutant concentrations to predict mathematically the effects of future pollution controls. The Administrator intends to analyze the modeling results, determine appropriate control measures and publish a notice of proposed rulemaking on September 20, 1990. A public hearing will be held in October, and the

The court of appeals' order not only curtails the Administrator's exercise of discretion, it eliminates or hampers the ability of other interested parties to exercise their statutory rights. For example, Section 110(c)(1) of the Clean Air Act provides that a State may avoid the Administrator's imposition of a FIP if, prior to its promulgation, "such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section." § 110(c)(1), 42 U.S.C. 7410(c)(1). The court of appeals' order in this case, however, prevents Arizona from exercising that important right and limits the State to "submit[ting] proposals to the EPA for its consideration in developing the plans." App., *infra*, 16a n.1. In addition, EPA expects that Arizona citizens, who will be directly affected by the FIP's pollution control measures, will wish to participate through the public commenting process in the preparation of the FIP. The court of appeals' deadline, however, will impose serious time constraints on the Administrator's ability to analyze public comments in formulating the final rule. See note 6, *supra*. Indeed, it is not uncommon, and sometimes necessary, for an agency to issue a revised proposed rule in response to public comments. See, *e.g.*, *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1181 (6th Cir. 1985). See also *Small Refiner Lead Phase-Down Task Force* v.

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public comment period will close in early November. If the government fails to secure relief from the court of appeals' order, the Administrator will have a mere three weeks to analyze the public comments, make appropriate revisions, and sign a final rule. See *Rodway* v. *Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975) (noting an agency's obligations to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule").

EPA, 705 F.2d 506, 546-547 (D.C. Cir. 1983). The court of appeals' timetable intrusively forecloses that option.

As this Court observed, there is a special need to adhere to Congress's dictates where "important public rights are at stake." *General Motors*, 110 S. Ct. at 2534. In this case, the Clean Air Act specifies an important but limited role for the court of appeals, namely, to review agency action. The court of appeals ignored the Act's limitations and dictated the Administrator's actions on remand. This Court's recent decision in *General Motors* indicates that the court of appeals acted improperly. We submit, however, that the court of appeals should be given an opportunity to reconsider its decision before this Court conducts plenary review. The court of appeals' decision was issued prior to this Court's guidance in *General Motors*, and the court's opinion provided no reasoning or justification for its decision or for its departure from other established precedent. We suggest, accordingly, that this aspect of the court of appeals' judgment should be vacated and the case remanded to the court of appeals for reconsideration in light of *General Motors*.

In the alternative, it would be appropriate for this Court to reverse summarily the court of appeals' judgment insofar as it dictates the Administrator's actions on remand. The court's presumption that the Administrator would not act properly and according to law, and the court's exercise of control over the Administrator's activities on remand (including their scheduling), are flatly inconsistent with well settled principles of administrative law. Moreover, the court of appeals' actions will seriously hamper the Administrator's ability to promulgate a FIP that satisfies the requirements of the Clean Air Act while providing the State of Arizona, its citizens, and other affected persons with an appropriate opportunity for public participation.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated insofar as it orders the Administrator to promulgate a FIP within a specified time period, and the case remanded for further consideration in light of this Court's decision in *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990). In the alternative, the Court may wish to consider summary reversal of the court of appeals' judgment insofar as it orders inappropriate relief.

Respectfully submitted.

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SEPTEMBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-7368

ROBERTA DELANEY; GAYLE HARTMANN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Petition for Review of Action by the Environmental Protection Agency

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Argued and Submitted
June 26, 1989—San Francisco, California

Filed March 1, 1990
Amended April 11, 1990

AMENDED OPINION

Before: THOMAS TANG, STEPHEN REINHARDT and CHARLES WIGGINS, *Circuit Judges.*

OPINION

WIGGINS, Circuit Judge:

Residents of Maricopa and Pima counties, Arizona, petition this court to vacate as arbitrary and capricious the Environmental Protection Agency's approvals of the counties' Clean Air Act implementation plans. We have jurisdiction under 42 U.S.C. § 7606(b)(1) (1982). We vacate the EPA's approvals of the plans, and direct the EPA to take further action consistent with this opinion.

BACKGROUND

The Clean Air Act, as amended in 1970, mandated that states as expeditiously as practicable, but not later than December 31, 1975, reduce the levels of certain ambient pollutants to comply with the National Ambient Air Quality Standards set by the EPA. 42 U.S.C. § 7409(a), (b) (1982). Preliminarily, each state had to develop a state implementation plan to achieve this goal. 42 U.S.C. § 7410(a) (1982).

After many areas of the country failed to attain some or all of the national ambient air quality standards on time, Congress amended the Act in 1977, providing new deadlines for nonattainment areas. 42 U.S.C. §§ 7501-7508 (1982). The 1977 amendments required states to submit by January 1, 1979, for each of their nonattainment areas, a revised implementation plan that provided for implementation of all reasonably available control measures to attain the relevant national ambient air quality standards as expeditiously as practicable, but not later than December 31, 1982. 42 U.S.C. § 7502. If a state did not submit an adequate revised state implementation plan by the 1979 deadline, the EPA had to promulgate its own federal implementation plan. 42 U.S.C. §§ 7410(c)(1), 7502(b)(1). The 1977 amendments provided only one exception: If a

state demonstrated in its revised implementation plan that the carbon monoxide or ozone ambient air quality standard could not be attained by the close of 1982 despite implementation of all reasonably available control measures, the state could have until the end of 1987 to attain the relevant air quality standard in that nonattainment area. 42 U.S.C. § 7502(a)(2). In that case, the state had to submit a second revised implementation plan to the EPA by July 1, 1982. 42 U.S.C. § 7502(c).

In 1978, the EPA designated large areas of both Maricopa and Pima counties as nonattainment areas for carbon monoxide. In 1979, Arizona submitted revised implementation plans for both areas. In 1983, the EPA approved the plans subject to certain conditions. Neither area, however, satisfied the EPA's conditions or attained the carbon monoxide standard by the 1982 deadline. Arizona failed in its attempt to extend both areas' attainment deadlines to 1987, but submitted additional revised plans for the areas to attain by the 1987 deadline anyway. The EPA rejected these additional revised plans and we upheld that decision. *Arizona v. Thomas*, 824 F.2d 745 (9th Cir. 1987), *later proceeding* 829 F.2d 834 (9th Cir. 1987).

When Arizona thereafter failed to submit adequate plans for Maricopa and Pima counties, petitioners filed suit in the Arizona district court. That court ordered the EPA to promulgate implementation plans for both counties by March 30, 1988 (later extended to August 10, 1988), unless before this date Arizona submitted, and the EPA approved, adequate state plans. *McCarthy v. Thomas*, No. 85-344 (D. Ariz. August 10, 1987). Arizona submitted, and the EPA ultimately approved (with revisions), state implementation plans for both counties on August 10, 1988. Petitioners now challenge these approvals.

DISCUSSION

We will not set aside the EPA's approval of a state implementation plan unless it is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Arizona v. Thomas*, 824 F.2d at 748. We will not set aside an agency's construction of a statute it is implementing unless that construction conflicts with clear congressional intent or is unreasonable. *Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984).

I. THE EPA'S DECISION THAT DELINQUENT NONATTAINMENT AREAS MAY TAKE THREE YEARS FROM APPROVAL OF THEIR STATE IMPLEMENTATION PLAN TO ATTAIN THE NATIONAL AMBIENT AIR QUALITY STANDARDS

Because the Clean Air Act amendments of 1977 made the 1982 compliance deadline absolute (with the one exception noted above), the amendments did not specify an additional deadline for nonattainment areas that failed to obtain revised implementation plan approval and national ambient air quality standard compliance by the 1982 deadline. In this circumstance, the EPA adopted the policy that it should evaluate the adequacy of the Maricopa and Pima county plans based on whether they provide for attainment by three years from the date it approved those plans, August 10, 1991. Petitioners contend that the EPA's policy is arbitrary and capricious. Now that the 1977 amendments' deadline for compliance has passed, petitioner assert, Pima and Maricopa Counties must attain the carbon monoxide ambient air quality standard as soon as possible utilizing every available control measure.

The EPA contends that Congress expressed no clear intent on the attainment deadline that the EPA should apply

in evaluating the Maricopa and Pima county plans because the 1977 amendments did not specify a deadline for nonattainment areas that failed to obtain revised state implementation plan approval and national ambient air quality standard compliance by the 1982 deadline. The EPA argues that this amounts to a "statutory gap." As a result, the EPA believes, we must uphold its policy of allowing compliance within three years of state implementation plan approval because it is a reasonable construction of the 1977 amendments.

The EPA argues that if Congress had considered that some nonattainment areas would not meet the deadline specified in the 1977 Amendments, Congress would have intended that the EPA administratively establish a new three year attainment period from the date of implementation plan approval deadline, like those provided in the Clean Air Act amendments of 1970. The EPA contends that this result is consistent with the language, history, and overall purposes of the Act. The EPA contends that Congress knew some states would not attain by the 1982 deadline and did not intend that states implement draconian measures.

The EPA explains the seemingly absolute nature of the 1977 amendments' 1982 deadline by stating that some legislators felt the need to keep fixed deadlines, even as "somewhat of a legal myth," because they "provided a basis for obtaining maximum progress towards clean air." Transcript, Mark-up, Clean Air Act Amendments, at 13 (May 4, 1977) (Statement of Sen. Domenici), *reprinted in* State Implementation Plans for Nonattainment Areas for Ozone and Carbon Monoxide: General Preamble and Notice of Future Actions, 52 Fed. Reg. 26,408 (July 14, 1987) [hereinafter "Preamble and Notice"]. If the deadlines turned out not to be realistic, there would be

"plenty of time for legislative relief." 123 Cong. Rec. 18,038 (June 8, 1977) (Statement of Sen. Stafford), *reprinted in* Preamble and Notice, 52 Fed. Reg. 26,408 (July 14, 1987). The EPA contends that petitioners' position would require the draconian measures that Congress allegedly intended to avoid. The EPA argues that, in effect, it is just doing what Congress did in 1977 when, faced with many states' failure to meet attainment deadlines, Congress revised the Clean Air Act, extending those deadlines at least three years.

Although we recognize the EPA's predicament, we cannot accept the EPA's position. As the EPA itself recognizes, Congress explicitly declined to allow extensions of the deadline because it believed an absolute deadline to be necessary. Other circuits have characterized the 1982 deadline as the " 'heart' of the 1977 Amendments," *City of Seabrook v. EPA*, 659 F.2d 1349, 1357 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982), implemented according to a precise schedule to avoid a repetition of the failure of many states to attain the national ambient air quality standards by the deadline specified in the 1970 amendments. *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998, 1001-02 (2d Cir.), *cert. denied*, 459 U.S. 1035 (1982).

This court has already found the deadlines of the 1977 amendments to be "clear and unambiguous." *Abramowitz v. EPA*, 832 F.2d 1071, 1079 (9th Cir. 1987). We stated:

> Because we find the language of the Act clear and unambiguous, we do not believe that EPA has the discretion to ignore the statutory deadline. We are informed by counsel for both sides of their expectation that Congress will extend the deadline once again in the near future, but we must apply the law as it now stands, not as it may become. . . . Until the Clean Air

> Act is further considered . . . the Agency must "give effect to the unambiguously expressed intent of Congress."

Id. (citations omitted).

We, and the EPA, are bound by the statutory scheme until Congress alters that scheme. As the EPA states in one of its national guidance documents:

> [T]he legislative history shows that Congress set up the Part D system in order to force communities and industry to do their utmost to bring about attainment as rapidly as possible and expected that a future Congress would change the course it had set, if necessary, to avoid any unacceptable consequences.
>
> . . .
>
> . . . Plainly, the original intention of the committee, which evolved ultimately into the current Part D system, was to generate [state implementation plans] that would provide for attainment by a specific date, even if they contained draconian measures, and to leave the task of making adjustments to a future Congress.

Preamble and Notice, 52 Fed. Reg. 26,407-08 (July 14, 1987).

When Congress has explicitly set an absolute deadline, congressional intent is clear. It is a semantic game to claim that once a state fails to meet an absolute deadline, a statutory gap is created because Congress has not provided a back-up deadline for its explicitly absolute deadline. If Congress had been more lenient and allowed a one-year fall back extension, the EPA would be bound by that directive. The EPA cannot extract leeway from a statute that Congress explicitly intended to be strict.

In any case, the EPA's national guidance documents state that for those areas that qualified for an extension

from 1982 to 1987, if their control measures "are not adequate to demonstrate attainment by 1987, additional measures which can be implemented after 1987 must be identified and adopted and attainment must be demonstrated by the earliest possible date." Environmental Protection Agency Criteria for Approving 1982 Ozone and Carbon Monoxide Plan Revisions, 46 Fed. Reg. 7186 (January 22, 1981) [hereinafter "Criteria"]. "The 1982 [state implementation plan] revision . . . must demonstrate that all possible measures will be implemented. . . ." *Id.* at 7188 (listing four examples of additional control measures). We believe that it is unreasonable for the EPA to treat more leniently areas that did not qualify for the 1987 extension than areas that did qualify. We believe that the only reasonable interpretation of the 1977 amendments is that if the 1982 deadline that Congress specified is not met, the national ambient air quality standards must be attained as soon as possible with every available control measure, including those that the EPA identified in its criteria for approving 1982 plans.

II. THE EPA'S DECISION THAT THE MARICOPA AND PIMA PLANS PROVIDE FOR SUFFICIENT CONTROL MEASURES

The plans that the EPA approved for Maricopa and Pima Counties are similar. Both require that:

(1) gas stations sell only high oxygen content fuel during winter months (when carbon monoxide levels are highest);

(2) large employers reduce the amount of single car commuting by their employees;

(3) automobiles be tested for emission levels while under load as well as while idling.

Petitioners point out that neither the Maricopa plan nor the Pima plan adopts most of the forty-five measures recommended in a study of Maricopa County conducted by the Maricopa Association of Governments, a regional planning organization. Similarly, neither plan adopts most of the twelve measures recommended by Cambridge Systematics, a group that conducted an EPA-sponsored study of Maricopa County. The excluded measures include major expansion of mass transit, imposition of parking controls, significant use of bus and carpool lanes, reductions in bus fares, restrictions on truck travel during peak periods, application of the Maricopa and Pima county oxygenated fuel program and automobile emission testing program to the entire state, elimination of waivers to the automobile emission testing program, and adoption of year-round daylight savings time. The Maricopa Association of Governments noted that immediate implementation of all the measures it identified could have produced attainment within one year.

Petitioners contend that it was arbitrary and capricious for the EPA to approve the plans without more control measures. The EPA contends that it properly approved the Maricopa and Pima plans with just the three control measures that they contain, because additional control measures "could not be demonstrated to further accelerate the projected attainment date."

The EPA has, however, arbitrarily shifted from Arizona the burden of demonstrating that control measures would not accelerate the projected attainment date. An EPA guidance document explicitly provides that each of the eighteen measures listed in 42 U.S.C. § 7408 is presumed reasonably available; a state can reject one of these measures only by showing that the measures either would not advance attainment, would cause substantial wide-

spread and long-term adverse impact, or would take too long to implement. The document states:

> [I]f a state adopts less than all [reasonably available control measures] *and demonstrates* (a) that reasonable further progress and attainment of the [national ambient air quality standards] are assured, and (b) that application of all [reasonably available control measures] would not result in attainment any faster, then a plan with less than all [reasonably available control measures] may be approved.

State Implementation Plans; General [P]reamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas, 44 Fed. Reg. 20,375 (April 4, 1979) (emphasis added).

Neither the Maricopa plan nor the Pima plan contains serious commitment to many of the measures listed in section 7408, including: 1) limiting portions of roads to common carriers; 2) improving transit systems with major changes in existing facilities; 3) controlling on-street parking; 4) establishing auto-free zones; 5) instituting road user fees that discourage single occupant automobile trips; or 6) retrofitting older vehicles with emission control devices. *See* 42 U.S.C. § 7408(f)(1)(A)(v), (vi), (vii), (ix), (xiii), (xvii). Yet Arizona has made no claim that any of the control measures that section 7408 or the Maricopa Association of Governments identified is impracticable or unreasonable in either Maricopa County or Pima County.

Furthermore, as noted above, for a nonattainment area that qualified for deadline extension to 1987, the 1977 amendments require implementation of not only all reasonably available control measures, but also any additional measures necessary to ensure timely attainment. 42 U.S.C. § 7502(b)(11)(C). If such an area failed to attain the relevant ambient air quality standard by 1987, the

EPA required implementation of "all possible measures" and more extensive evidence to justify failure to adopt any of the measures listed in section 7408 in order to ensure "the most expeditious [attainment] date beyond 1987." Criteria, 46 Fed. Reg. 7188 (January 22, 1981). The EPA expressly applied these requirements to nonattainment areas that failed to meet the 1982 statutory deadline and did not qualify for deadline extensions to 1987. Guidance Document for Correction of Part D SIP's For Nonattainment Areas, January 27, 1984, at 32-33 [hereinafter "Part D SIP's for Nonattainment Areas"].

We, therefore, conclude that the EPA arbitrarily and capriciously found that the Maricopa and Pima plans provide for sufficient control measures.

III. THE EPA'S DECISION THAT THE MARICOPA PLAN PROVIDES ADEQUATE CONTINGENCY AND CONFORMITY PROVISION[S]

The EPA's published guidelines require post-1982 carbon monoxide implementation plan revisions to contain a contingency plan to be implemented if shortfalls in emission reductions occur during the period covered by the plan. *See* Criteria, 46 Fed. Reg. 7188 (January 22, 1981) (prescribing the policy for nonattainment extension areas). The contingency plan must provide: (a) a list of planned transportation measures that may adversely affect air quality and that will be delayed while the state implementation plan is being revised, if expected emission reductions or air quality improvements do not occur; and (2) a description of the process that will be used to determine and implement additional transportation measures beneficial to air quality that will compensate for unanticipated shortfalls in emission reductions. *Id.*

The Maricopa plan contains neither of these. Petitioners contend that the EPA arbitrarily and capriciously waived

its contingency plan requirement. The EPA contends that its contingency plan provision applies only to nonattainment extension areas. But as we note above, the EPA expressly applied its nonattainment extension area requirements to nonattainment nonextension areas. *See* Part D SIP's for Nonattainment Areas, at 32-33. Indeed, it would be anomalous for the EPA not to require as stringent measures for delinquent areas as for areas that qualified for extensions.

The EPA alternatively contends that each plan contains two traffic control measures beyond those necessary to demonstrate attainment by December 31, 1991, and that these additional measures are the functional equivalent of a contingency plan. We disagree. First, we held above that the EPA erred in not requiring compliance before December 31, 1991. Second, the EPA concedes that the two traffic control measures in question—a voluntary no-drive day program and a minimum market share for alcohol fuels—are of such speculative value that the EPA could not assign them any emission reduction value. *See* Approval and Promulgation of Implementation Plans; Arizona State Implementation Plan Revision; Maricopa County Carbon Monoxide Plan, 53 Fed. Reg. 30,232 (August 10, 1988) [hereinafter "Approval of Maricopa Plan"]. Programs of such speculative benefit are not the functional equivalent of a list of specific projects that will be delayed and a description of the specific process that will be used to determine and implement additional transportation control measures if they become necessary. We find that the EPA has arbitrarily and capriciously waived its requirement of a contingency plan.

The Clean Air Act explicitly requires that all federal activities conform to Clean Air Act Implementation Plans. 42 U.S.C. § 7506(c). The EPA guidelines direct that to

assure compliance with this mandate, each implementation plan "should identify, to the extent possible, the direct and indirect emissions associated with major federal actions. . . ." Criteria, 46 Fed. Reg. 7188 (January 22, 1981). The state implementation plan must contain "[a]dministrative and technical procedures and agency responsibilities for ensuring . . . that transportation plans, programs and projects" will conform with the state implementation plan. *Id.* The EPA does not dispute that the Maricopa plan fails to meet either requirement. Petitioners argue that the EPA arbitrarily and capriciously waived these requirements. The EPA argues, however, that we should sustain as within its discretion, its finding that the plan sufficiently assures conformity "given the flexibility which should be accorded [the EPA's] practical implementation of the [Clean Air Act]'s statutory provisions."

Again, we cannot agree. The EPA must adhere to its own guidelines. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 388 (1957). Because it is undisputed that the Maricopa plan fails to meet either of the EPA's own requirements and the EPA offers no reason for waiving those requirements, we can conclude only that the EPA arbitrarily and capriciously approved the plan. *See Illinois State Chamber of Commerce v. EPA*, 775 F.2d 1141, 1147 (7th Cir. 1985).

IV. THE EPA'S DECISION THAT THE MARICOPA PLAN PROVIDES ADEQUATE MAINTENANCE OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS

The Clean Air Act requires that implementation plans provide for maintenance of national ambient air quality standards after attainment. 42 U.S.C. § 7410(a)(2)(B). Petitioners contend that the Maricopa provisions for

maintenance are inadequate because the plan considers air quality only ten years into the future. The EPA required projections only ten years into the future because it found that projections beyond ten years are unreliable. Of course, this finding would not have justified the EPA's disregard for its rules without a formal revision of the rules in accordance with the Administrative Procedure Act. But even assuming that the EPA's own rule generally requires maintenance projections twenty years into the future applies to delinquent nonattainment nonextension areas (which the EPA disputes), that rule allows plans to provide maintenance projections only ten years into the future. The rule states:

> The time period analyzed shall extend at least 20 years or, if modified under § 51.63, not less than 10 years from the date on which the Administrator identified the area.

40 C.F.R. § 451.42 (1987). Section 51.63(a) adds:

> At the request of a State, or under his own initiative, the Administrator, where he determines it appropriate, may approve alternative [air quality maintenance area] analysis and plan development procedures as allowed under §§ 51.42, 51.44, 51.45, 51.46, 51.48(b), and 51.60(a). He may consider all relevant factors including but not limited to air quality problems, financial and manpower limitations, administrative feasibility, and existing commitments by the State.

40 C.F.R. § 51.63(a) (1987).

The preamble to these regulations specifically states that one of Section 51.63(a)'s "relevant factors" is the reliability of the maintenance projections:

> The time periods will be selected by the Administrator, through his Regional Administrators, consider-

> ing such factors as State resources, other planning programs that may significantly affect air quality, *the reliability of projections*, and the extent of present and potential air quality problems.

Maintenance of National Air Quality Standards—Summary, 41 Fed. Reg. 18,386 (May 3, 1976) (emphasis added).

In this case, the EPA specifically found that projections beyond ten years into the future "become too speculative to be reliable." Approval of Maricopa Plan, 53 Fed. Reg. 30,234 (August 10, 1988). Petitioners' own contention that traffic projections changed dramatically from February 1987 to October 1987 supports the EPA's conclusion that projections are quite speculative. We, therefore, cannot say that the EPA arbitrarily or capriciously required a maintenance projection only ten years into the future.

V. THE EPA'S DECISION NOT TO CONSIDER REVISED, INCREASED VEHICLE TRAFFIC PROJECTIONS IN EVALUATING THE MARICOPA PLAN

The Maricopa plan based its projection that Maricopa County would attain the carbon monoxide ambient air quality standard by 1991 on traffic projections made in 1984 and in February 1987. The EPA refused to consider revised, increased vehicle traffic projections for Maricopa County that petitioners presented during the public comment period for the Maricopa plan. The EPA argues that petitioners submitted this new data only four weeks before the approval deadline and thus the EPA lacked sufficient time to incorporate it into the plan. Petitioners contend that the EPA acted arbitrarily and capriciously in failing to consider the revised, increased vehicle traffic projections. They also contend that the EPA's decision that the Maricopa plan provides adequate maintenance of the na-

tional ambient air quality standards was arbitrary and capricious because it failed to rely on the revised vehicle traffic projections.

We do not determine whether the EPA acted arbitrarily and capriciously in its decision not to consider the revised traffic projections. Our holdings on the other issues in this case require the EPA to develop a new Maricopa county implementation plan. To develop that plan properly the EPA will, of course, need to consider the most recent vehicle traffic projections currently available. Whether, due to time constraints, the EPA in 1988 justifiably refused to consider the revised, increased traffic projections is now an issue of only academic significance.

CONCLUSION

We grant the petition for review. We vacate the EPA's approvals of Maricopa and Pima counties' Clean Air Act implementation plans. We direct the EPA to disapprove these plans and to promulgate federal implementation plans consistent with this opinion within six months.[1] To summarize, the new plans must utilize all available control measures to attain the carbon monoxide ambient air quality standard as soon as possible. The new plans must contain contingency and conformity plans in accordance with EPA guidelines and must be based on the most recent traffic projections currently available. We grant petitioners' motion for fees and costs and direct petitioners to submit appropriate documentation to this court.

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[1] Arizona may, of course, submit proposals to the EPA for its consideration in developing the plans.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7368

ROBERTA DELANEY; GAYLE HARTMANN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

[Filed MAY 16, 1990]

ORDER

Before: TANG, REINHARDT and WIGGINS, *Circuit Judges.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 88-7368

ROBERTA DELANEY; GAYLE HARTMANN, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

JUDGMENT

[Filed and entered March 1, 1990]

Upon Petition to Review an order of the Environmental Protection Agency

This Cause came on to be heard on the Transcript of the Record from the Environmental Protection Agency and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition for review of the order of the Environmental Protection Agency in this cause be, and hereby is GRANTED.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 110(c) of The Clean Air Act, 42 U.S.C. 7410(c). .

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(a) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the re-

quirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 of this title shall not be required to be promulgated before the date eight months after such date required for submission.

Section 304(a) of The Clean Air Act, 42 U.S.C. 7604(a).

Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Section 307(b) of The Clean Air Act, 42 U.S.C. 7607(b).

Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the

Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

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No. 90-456

In The

Supreme Court of the United States

October Term, 1990

WILLIAM K. REILLY, Administrator of the Environmental Protection Agency, et al.,

Petitioners,

v.

ROBERTA DELANEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the propriety of relief ordered by the Court of Appeals where petitioners did not challenge that court's authority to order such relief until a petition for rehearing, even though the relief had been specifically requested in the opening brief below.

2. Whether the Court of Appeals, in a case over which it concededly had jurisdiction under the Clean Air Act, properly directed the Administrator of the Environmental Protection Agency on remand to prepare a federal clean air plan for Arizona, where the Act expressly required the Administrator to prepare such a plan as a consequence of the court's decision on the merits.

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No. 90-456

In The

Supreme Court of the United States

October Term, 1990

WILLIAM K. REILLY, Administrator of the Environmental Protection Agency, et al.,

Petitioners,

v.

ROBERTA DELANEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondents Roberta Delaney, Gayle Hartmann, David Horley, Alma Williams, Maureen Mageau-Decindis, and Brian McCarthy hereby oppose the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

COUNTERSTATEMENT OF THE CASE

For purposes of this brief, respondents incorporate the statement of facts and historical background as set forth by the court of appeals. Petition for Writ of Certiorari (Petition) at 2a-3a. The following statement clarifies several key points.

1. Respondents' opening brief in the court of appeals specifically requested, among other things, that the court direct the Administrator of the Environmental Protection Agency (EPA) to disapprove the Arizona state implementation plan (SIP) and promulgate a federal implementation plan (FIP) within six months. Brief for Petitioners at 43, *Delaney v. EPA*, 898 F.2d 687 (9th Cir. 1990). EPA's responding brief did not specifically oppose this request for relief or in any way suggest that the court of appeals lacked authority to enter such an order. It was not until the Agency filed its petition for rehearing, after the court had issued its decision and order, that EPA questioned the propriety of ordering FIP promulgation on remand.

2. EPA did not request a stay of the court of appeals' mandate. Instead, the Agency indicated its intention to comply with the six month deadline for preparing a federal plan. Petition at 12. EPA issued its proposed FIP on September 20, 1990, and published the proposal in the Federal Register on October 10, 1990. 55 Fed. Reg. 41204 (Oct. 10, 1990). On October 29, 1990, EPA filed a motion in the Ninth Circuit requesting a two month extension of the November 26, 1990 deadline for FIP promulgation. That motion is still pending as of this writing.

3. The requirement that EPA promptly prepare a FIP was not an invention of the court of appeals. Section 110(c) of the Clean Air Act (the Act) expressly requires federal plan preparation upon EPA disapproval of a state implementation plan. Courts have uniformly held that the plan preparation duty arises automatically upon a finding of state plan inadequacy. *See e.g., Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1153-54 (7th Cir. 1983); *City of Seabrook v. EPA*, 659 F.2d 1349, 1352-53 (5th Cir. 1981); *McCarthy v. Thomas*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 21214, 21217 (D. Ariz. 1987). Moreover, prior to the Ninth Circuit decision, EPA's duty to promulgate a FIP for Arizona had been firmly and finally established in the district court proceeding. Thus, in ordering EPA to disapprove the Arizona SIP – an order that EPA does not contest – the court of appeals necessarily triggered the Agency's plan promulgation duty as well. The Court's remand order simply directed EPA to do what the statute and the prior district court decision unmistakably required at that point.

4. The Ninth Circuit's order came in the context of a long history of EPA delays in implementing the Clean Air Act in Arizona. The Act required the state to submit a SIP by 1979 adequate to ensure attainment of clean air standards by the end of 1982. 42 U.S.C. §7502(a); Pub. L. No. 95-95, §129(c). It further imposed the federal promulgation duty on EPA to ensure that the attainment deadline would be met if the state faltered. In Arizona, EPA did not take final action on the Arizona SIP until 1986, and refused to commence promulgation of a federal plan until ordered to do so by the district court in 1987. By the time this matter reached decision in the Ninth Circuit, Arizona

was more than eleven years delinquent in preparation of an adequate clean air plan, and nearly eight years delinquent in meeting clean air standards. The process would have been protracted even further if respondents had been forced to return to the district court for another order requiring federal plan promulgation.

5. The Act's judicial review provisions do not confer exclusive jurisdiction on the district courts to order federal plan promulgation. Although §304(a)(2) allows the district courts to order EPA performance of non-discretionary duties, it does not by its terms limit such authority exclusively to the district courts. Nor does §307, under which the Ninth Circuit exercised jurisdiction below, contain any language limiting the type of remedy that an appellate court can order in reviewing EPA action in approving a state implementation plan. As further discussed below, both courts and commentators have concluded that courts of appeals can order EPA to perform non-discretionary duties in matters properly brought before such courts under §307 of the Act.

6. In the district court proceedings, EPA raised many of the same arguments that it now presents against being required to adopt a federal plan within six months: e.g., that the time frame is insufficient and that the demands on Agency resources are too great. The district court rejected these arguments, and EPA chose not to appeal. *McCarthy v. Thomas*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 21214, 21216-17 (D. Ariz. 1987), 18 Envtl. L. Rep. (Envtl. L. Inst.) 21025, 21026 (D. Ariz. 1988). Moreover, EPA does not have to start from scratch in preparing a federal plan for Arizona. The carbon monoxide problem in Phoenix and Tucson has been the subject of numerous

studies over the past eleven years (*see e.g.*, Petition at 9a), and the Agency has very recent experience in drafting a proposed federal plan for Arizona. 53 Fed. Reg. 17378 (1988). In other cases, EPA has promulgated federal implementation plans within approximately six months. *See e.g., District of Columbia v. Train*, 521 F.2d 971, 978 (D.C. Cir. 1975), *vacated on other grounds sub nom, EPA v. Brown*, 431 U.S. 99 (1977); *Pennsylvania v. EPA*, 500 F.2d 246, 249 (3rd Cir. 1974).

REASONS FOR DENYING THE WRIT

This Court's long standing practice has been to refrain from reviewing questions not raised in a timely manner in the proceedings below. Because EPA did not object to respondents' request for a federal plan promulgation order until after the decision below, review should accordingly be denied. This Court's decision last term in *General Motors Corp v. United States*, 110 S. Ct. 2528 (1990), provides no conceivable basis for vacating and remanding this case for further consideration by the court of appeals. *General Motors* simply held that EPA is not barred from bringing suit to enforce an existing state implementation plan where the Agency has delayed action on a proposed revision to that plan. The decision says nothing whatsoever about a circuit court's authority to enter appropriate remand orders upon finding that EPA has illegally approved a deficient state plan under the Act. Courts of appeals have routinely issued remand orders directing EPA to perform nondiscretionary duties where those duties are set forth explicitly in the Act and flow directly from the court's decision on the merits of a

petition for review. A plan promulgation order was particularly apt under the unique circumstances of this case, where EPA had already once before been ordered to prepare a federal plan and compliance with clean air standards was more than seven years past due.

1. The general rule is that this Court will decline review on issues not raised in a timely manner below. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986). The rule applies with full force where, as here, the issue was not raised until a petition for rehearing in the court of appeals. *Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984). The Agency's tardiness strongly suggests that its challenge to the relief requested is little more than an afterthought. The fact that EPA did not seek to stay the Ninth Circuit's mandate and has already published its proposed FIP further undermines any claim that the remand order raises serious problems deserving of this Court's attention.

2. This Court's decision in *General Motors* is completely irrelevant to the correctness of the Ninth Circuit's remand order below. The sole issue in *General Motors* was whether EPA could be barred from bringing suit to enforce an existing state implementation plan on the ground that the Agency had unreasonably delayed action on a proposed revision to that plan. The Court found no enforcement bar because the Act did not reveal any congressional intent to preclude enforcement under the circumstances. 110 S. Ct. at 2533-34. The decision says nothing whatsoever about the authority of the circuit courts to enter appropriate remand orders in Clean Air Act cases, and does not hold that district courts have

exclusive authority to order EPA performance of non-discretionary duties. The Court's opinion does note in passing that §304 of the Act provides one possible avenue of relief for unreasonable EPA delay, but does not in any way suggest that the district courts have the sole authority to order EPA compliance with the statute. 110 S. Ct. at 2534.

Even if *General Motors* is read more broadly to hold that the courts may not supplant statutory remedies under the Act with judicially created ones, the decision below is unaffected. The remedy ordered by the Ninth Circuit, federal plan promulgation by EPA, is precisely the one mandated under §110(c) of the Act. It was not created by some inference of the court as was the enforcement bar in *General Motors*. Nor is there any language in the Act expressly precluding a circuit court from enforcing the clear mandate of §110(c). To the contrary, §307 expressly confers *exclusive* jurisdiction on the courts of appeals to act on petitions for review such as the one in this case. *See e.g., City of Seabrook v. Costle*, 659 F.2d 1371, 1373 (5th Cir. 1981).

3. There is nothing novel or unusual in the Ninth Circuit's remand order in this case. Other circuit courts have ordered EPA to promulgate federal plan provisions upon finding that the Agency had illegally approved inadequate state plans. *See, e.g., Natural Resources Defense Council v. EPA*, 478 F.2d 875, 888-91 (1st Cir. 1973); *Natural Resources Defense Council v. Environmental Protection Agency*, 475 F.2d 968, 970-72 (D.C. Cir. 1973). Circuit courts have also routinely issued remand orders directing EPA to perform other non-discretionary duties, where those duties flowed directly from the court's decision on

the merits of a petition for review. *See, e.g., Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1331 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1989); *Abramowitz v. U.S. EPA*, 832 F.2d 1071, 1075-76, 1078-79 (9th Cir. 1987); *Sierra Club v. EPA*, 719 F.2d 436, 469-70 (D.C. Cir. 1983), *cert denied*, 468 U.S. 1204 (1984); *Connecticut Fund for the Environment v. EPA*, 672 F.2d 998, 1009 n. 24 (2d Cir.), *cert denied*, 459 U.S. 1035 (1982). The decisions recognize that there is considerable overlap between the Act's judicial review provisions, §§304 and 307, and that the circuit courts are not precluded from ordering EPA to carry out mandatory duties in cases properly before them under §307 merely because similar relief might be available in the district court under §304. *See also Indiana & Michigan Electric Co. v. EPA*, 733 F.2d 489, 490-91 (7th Cir. 1984); *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 661 n.9 (D.C. Cir. 1975); 1 W.H. Rodgers, Jr., Environmental Law: Air & Water §3.3 at 197 (1986). The arbitrary limitation on circuit court powers urged by EPA would result in repeated games of "jurisdictional badminton" between the court of appeals and the district court that would seriously undermine enforcement of the Act. *See Abramowitz v. U.S. EPA*, 832 F.2d at 1075-76.

This Court has likewise ruled that once court of appeals jurisdiction over administrative action is provided by statute, it may be extended in the interests of judicial economy to include closely related matters that otherwise would be subject to review in district court. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 616-617 (1966). On a petition for review, a court of appeals may exercise equitable powers in its choice of remedy as long as it remains within the bounds of the

statute and does not intrude into the administrative province. *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 373 (1939). *See also* 5 U.S.C. §706(1) (requiring reviewing courts to compel Agency action unlawfully withheld or unreasonably delayed). Here, the court of appeals has prudently exercised its powers and prevented a needless waste of judicial resources by directing EPA to do what the Clean Air Act plainly required under the circumstances. The court's order does not in any way intrude upon matters that are wholly within the Agency's discretion, and in that respect this case is plainly distinguishable from those cited by EPA (Petition at 9-10) limiting judicial interference in matters of Agency judgment.

4. EPA's assertions about the inadequacy of the time allowed for plan preparation are unfounded. As already noted above, much of the groundwork for an Arizona implementation plan had already been completed before the court of appeals decision below, and the district court has previously rejected EPA claims that a six month time frame is inadequate for the task. The brevity of the public comment period on EPA's pending plan proposal is due to the Agency's delay in publishing the proposal – it is hardly the fault of the court of appeals. Nor can EPA seriously complain about the court of appeals' refusal to allow EPA to approve yet another Arizona SIP submittal in lieu of adopting a federal plan. Given the consistent inadequacy of the state's submissions for more than a decade, and the fact that EPA had already once been ordered to promulgate a federal plan, the court of appeals was fully justified in requiring firm and final action by EPA itself. *See Arizona v. Thomas*, 829 F.2d 834, 839 (9th Cir. 1987).

5. On October 27, 1990, Congress completed passage of the Clean Air Act Amendments of 1990. As of this writing, these amendments have yet to be signed by the President, and respondents have been unable to secure an official copy.[1] The respondents are informed that the amendments do not make any material changes in the Act relevant to the sole issue raised by EPA in its petition for certiorari – namely, the authority of the circuit courts to order FIP promulgation as part of a remand order. The bill apparently does not alter the relevant language of §307(b)(1) of the Act under which the Ninth Circuit exercised jurisdiction below, or the relevant language of §304(a) concerning district court authority to order EPA performance of nondiscretionary duties. *See* 136 Cong. Rec. 16953 (daily ed. Oct. 27, 1990) (statement of Senate Managers).

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 9, 1990

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[1] The bill was passed on the very last day of the session, and printing was apparently delayed due to the press of end of session business.

No. 90-456

NOV 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

ROBERTA DELANEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-456

WILLIAM K. REILLY, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents' brief in opposition does not provide a persuasive response to our petition for a writ of certiorari. Moreover, the significant changes in the law effected by the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, which the President signed on November 15, 1990, provide an additional ground for granting the petition, vacating the court of appeals' judgment, and remanding the case for further proceedings.

1. In opposing our petition for a writ of certiorari, respondents primarily contend that the government waived its right to challenge the court of appeals' action because "EPA did not object to respondents' request for

a federal plan promulgation order until after the decision below." Br. in Opp. 5. The government had previously argued, however, that respondents were not entitled to *any* relief because EPA's approval of Arizona's state implementation plans (SIPs) should be upheld. The government filed a timely petition for rehearing when the court of appeals not only reversed EPA's action but went on to impose the requirement that EPA promulgate federal implementation plans (FIPs) within a specified time period. The weakness of respondents' point is highlighted by the fact that neither the government nor respondents briefed the FIP promulgation issue prior to the court of appeals' decision. Respondents merely suggested that remedy in an isolated sentence of its 44-page brief, which described several alternative forms of relief. See Delaney C.A. Br. 43. There is no basis for concluding that the government waived its right to challenge the scope and nature of the remedy ordered by the court.

Respondents also contend that *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990), is "completely irrelevant to the correctness of the Ninth Circuit's remand order" because the judicial remedy in that case was an enforcement bar rather than an order requiring the agency to take certain actions. Br. in Opp. 6. *General Motors* indicates, however, that courts are to employ the Clean Air Act's statutory remedies, rather than create remedies of their own. See 110 S. Ct. at 2534. It is respondents' distinction between affirmative and prohibitive remedies that is beside the point. Similarly, respondents have no response to this Court's decisions, such as *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), holding that a court of appeals may not dictate an agency's actions on remand.[1]

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[1] Respondents additionally maintain that the court of appeals' remedy "is precisely the one mandated under § 110(c) of the [Clean Air] Act." Br. in Opp. 7. That is incorrect. Section 110(c) of the Clean Air Act, as written prior to revision by the Clean Air Act Amendments of 1990, provided at least eight months for promulga-

2. On November 15, 1990, the President signed into law the Clean Air Act Amendments of 1990. Pub. L. No. 101-549. These Amendments extensively revise the Clean Air Act's requirements and impose significant new obligations on the States with respect to the control and abatement of air pollution within their borders. Respondents are incorrect in suggesting (Br. in Opp. 10) that the Amendments are not relevant to this dispute.[2]

a. Among the revisions, the 1990 Amendments rescind previous deadlines (including the Clean Air Act's 1982/1987 attainment dates (see § 172(a), 42 U.S.C. 7502(a)); establish new timetables, depending on the severity of the nonattainment problem in a particular area, for the attainment of the national ambient air quality

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tion of a FIP in situations, as here, involving transportation controls (see 42 U.S.C. 7410(c)), and that period was subject to further extension. Section 307(d)(10), 42 U.S.C. 7607(d)(10). In opposing our application for a stay of enforcement of the court of appeals' judgment, respondents argued that the eight-month period runs from the date on which Arizona was required, under the Clean Air Act Amendments of 1977, to submit a state implementation plan (SIP)—January 1, 1979. See Opp. to Stay 10 n.4. But that contention simply underscores *our* point—the court of appeals' remedy is *not* "precisely the one mandated under § 110(c) of the Act" (Br. in Opp. 7). Section 110(c), until recently amended (see pp. 5, 6-7 *infra*), dealt with promulgation of a FIP where a State's initial SIP submission was inadequate or non-existent; it did not provide a timetable for preparing a FIP where a court invalidated a SIP. Moreover, because the court's directive flatly required EPA to "promulgate" FIPs within six months, the court prohibited EPA from exercising its authority to approve newly revised SIPs submitted by the State of Arizona that would satisfy the Act's requirements. See § 110(c), 42 U.S.C. 7410(c). In sum, the court of appeals' decision ignored both the statutory timetables for promulgating a SIP and the role which States are to play in achieving attainment of air quality standards. As we explain *infra*, Congress has now modified the relevant provisions.

[2] We provided the Court and other counsel with a copy of Title I of the 1990 Amendments, as set forth in the House Conference Report, with our application for a stay. See H.R. Conf. Rep. No. 952, 101st Cong., 2d Sess. 1-181 (1990) (typescript version).

standard (NAAQS) for carbon monoxide (CO); direct the States to submit revised SIPs meeting new, more stringent requirements and demonstrating attainment of the NAAQS by the revised statutory dates; set new timetables for the submission of the SIPs; and direct EPA to promulgate FIPs only after a State has failed to meet those new requirements. The Amendments also provide that if the Administrator finds that a SIP is deficient, he has two years from the date of disapproval in which to promulgate a FIP.

With respect to CO nonattainment areas, Congress added new sections to Part D of the Act that set new and more stringent requirements for SIPs in such nonattainment areas.[3] Sections 186-187 (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 134-149). The Amendments establish two classifications of CO nonattainment areas—"moderate" and "serious"—and set new dates for the attainment of the primary NAAQS for each classification. Section 186 (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 134-138). For a "moderate" CO nonattainment area, the primary NAAQS must be attained as ex-

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[3] Subpart 1 of new Part D (§§ 171-179) sets forth general requirements for nonattainment areas. Under amended Section 172(b) (revised by Section 102 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 33-60), the Administrator is to establish a schedule according to which States containing nonattainment areas shall submit a plan or plan revision. Each plan for a nonattainment area must meet certain general requirements. Revised Section 172(c), H.R. Conf. Rep. No. 952, *supra*, at 37-40. In addition, officials in each State containing a nonattainment area for any criteria pollutant are required to review jointly and update as necessary the planning procedures in effect before the Amendments or develop new planning procedures, as appropriate. Revised Section 174(a), H.R. Conf. Rep. No. 952, *supra*, at 47-48. In preparing such procedures, the State and elected officials are required, among other things, to determine which elements of a revised SIP will be developed, adopted, and implemented by the State and which by local governments or regional agencies or any combination of such entities. *Ibid.*

peditiously as practicable, but not later than December 31, 1995, a date that the Administrator may extend by up to two years if certain conditions are met. For a "serious" CO nonattainment area, the primary NAAQS must be attained as expeditiously as practicable, but not later than December 31, 2000. Section 186(a)(1), H.R. Conf. Rep. No. 952, *supra*, at 134-135.

Moreover, Congress imposed specific, and increasingly more stringent, requirements for Part D SIPs—depending on the area's nonattainment classification—with new deadlines for submitting the plans to EPA. Section 187 (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 138-149). In particular, a State must submit a CO SIP revision containing a demonstration of attainment for a "moderate" area within two years of enactment of the 1990 Amendments. Section 187(a)(7), H.R. Conf. Rep. No. 952, *supra*, at 141-142.

The 1990 Amendments also revise Section 110(c) of the Act, which addresses the Administrator's responsibility to promulgate FIPs. See Section 102(h) of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 60. Under the new law, the Administrator shall promulgate a FIP at any time within two years after: (a) the Administrator finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not meet the minimum requirements for plan submissions; or (b) he disapproves a SIP in whole or in part (unless the State corrects the deficiency and the Administrator approves the plan or plan revision before the Administrator promulgates such a federal plan). *Ibid.*

b. As the foregoing discussion shows, Congress has extensively revised the Clean Air Act to address the very problem presented in this case: the failure of numerous States to attain federal air quality standards for CO. EPA's obligation to prepare FIPs in this case should therefore be reconsidered in light of the 1990 Amendments. See *Bradley* v. *School Bd. of City of Richmond*,

416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 282 (1969). Under the 1990 Amendments, EPA has no statutory obligation —indeed, it has no authority—to promulgate federal plans at this time.

The Clean Air Act is premised on congressional findings that "prevention and control of air pollution at its source is the primary responsibility of States." 42 U.S.C. 7401(a)(3).[4] And consistent with that understanding, the 1990 Amendments require the States to undertake a new round of planning, develop revised SIPs providing for the attainment and maintenance of the NAAQS by new dates, and meet revised criteria for such plans.

EPA's responsibility to promulgate a FIP under revised Section 110(c) exists only in relation to its statutory authority to review and disapprove state plans; it does not exist independent of the States' obligations to submit plans meeting the Act's criteria. EPA has authority under revised Section 110(c) to promulgate a FIP only where the Administrator, among other things, has disapproved a plan because it does not meet the revised criteria for state plans. See Section 102(h) of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 60. Even then, the Administrator is given *two years* to promulgate a federal plan upon disapproval of a deficient state plan.[5] The Administrator is relieved of the obligation

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[4] See also 42 U.S.C. 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State * * *."). The 1990 Amendments affirm this basic understanding. Congress amended Section 101(a)(3) of the Act to emphasize that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments * * *." Section 108(k) of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 174.

[5] Section 110(c)(1) formerly provided that the Administrator was to promulgate a FIP within either six or eight months after plan submittal. 42 U.S.C. 7410(c)(1). Thus, Section 110(c), as

entirely if the State corrects the deficiency and EPA approves the corrected plan within that time period. *Ibid.*

The State of Arizona is now under a new obligation to revise the CO SIPs for the Maricopa and Pima nonattainment areas and to submit these plans for EPA approval by revised dates.[6] EPA should not be required to forge ahead with promulgation of FIPs for these areas—FIPs intended to serve as substitutes for SIPs found deficient under an outdated statute—when Congress has specifically directed the State to revise its SIPs. The promulgation of FIPs pursuant to the court of appeals' mandate would undermine Congress's intent that the States develop new plans and would preempt what has historically been the State's primary role in pollution control and abatement.[7] Because the Amendments impose new obligations on the States and new timetables for meeting those obligations, the State of Arizona should be provided with the opportunity, granted by statute, to meet those obligations.

c. The Clean Air Act Amendments of 1990 include a general savings clause set forth in new Section 193 of the Act (added by Section 108(*l*) of the Amendments,

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amended, not only lengthens the period for preparation of a FIP, but it makes clear that where EPA disapproves a SIP, the time period commences from EPA's disapproval. See note 1, *supra*.

[6] The Maricopa area apparently will qualify as a "moderate" CO nonattainment area. Accordingly, the new attainment date is December 31, 1995, and the State has two years in which to submit a new CO SIP. Sections 186(a)(1) and 187(a)(7) of the Act (added by Section 104 of the Amendments, H.R. Conf. Rep. No. 952, *supra*, at 134, 141-142). See also H.R. Rep. No. 490, 101st Cong., 2d Sess. 258-259 (1990). Although the Pima area apparently qualifies as a nonattainment area by operation of law (*id.* at 134), it now appears to have attained the CO NAAQS.

[7] See, *e.g.*, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266-267 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

H.R. Conf. Rep. No. 952, *supra*, at 174-175).[8] Specifically, Section 193 provides that if a "control requirement" is required to be adopted by an order, settlement agreement, or plan in effect before the date of enactment of the 1990 Amendments, the "control requirement" may not be modified unless the modification insures equivalent or greater emission reductions of the relevant air pollutant. That savings clause, by its terms, does not preserve the court of appeals' requirement that EPA prepare FIPs for the State of Arizona.[9] Furthermore, the court of appeals' decision does not require the adoption of any specific "control requirements."[10] Thus, Section

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[8] Section 193 states in full (emphasis added):

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this Act, as in effect before the date of the enactment of the Clean Air Act Amendments of 1990[,] shall remain in effect according to its terms, except to the extent otherwise provided under this Act, inconsistent with any provision of this Act, or revised by the Administrator. No *control requirement* in effect, or *required to be adopted by an order, settlement agreement, or plan in effect* before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

[9] As defined in the 1990 Amendments, a FIP is:

> a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

Section 108(j), H.R. Conf. Rep. No. 952, *supra*, at 173 (amending Section 302 of the Act, 42 U.S.C. 7602). In other words, a FIP is a comprehensive scheme by which all the Act's requirements can be met and is not itself a "control requirement."

[10] The court of appeals' decision requires EPA to promulgate FIPs within six months that "utilize all available control measures

193 has no application in this case. See 136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990) (statements of Senators Wilson and Chafee).[11]

d. The implementation of the Clean Air Act is a matter of important national interest. As this Court has stated, "in great national concerns * * * the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). A requirement that EPA prepare FIPs for Arizona in accordance with the court of appeals' judgment would be inconsistent with the newly enacted Clean Air Act Amendments of 1990. Indeed, Senator Chafee, a principal architect of the 1990 Amendments, made exactly that point in explaining the limited scope of the savings provision:

> If EPA were to promulgate complete new plans based on requirements of the old act, the areas subject to those Federal plans would be deprived of the opportunity to utilize the significantly revised and clearly more workable requirements of the revised act. This would be unreasonable, and clearly not our intent.

136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990). If the court of appeals' judgment in this case is allowed to stand, EPA would be required to follow that highly undesirable—and undemocratic—course.

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to attain the carbon monoxide ambient air quality standards as soon as possible." Pet. App. 16a; see also *id.* at 9a-11a. The decision does not require, however, the adoption of any particular control measures; instead, it preserved EPA's discretion to determine what "control measures" are available to meet the air quality standards.

[11] The first sentence of the savings provision (note 8, *supra*) has no application here because the Administrator did not take any final action to "promulgate[]" or "issue[]" a FIP for the areas in question before enactment of the Amendments.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in accordance with this Court's decision in *General Motors Corp.* v. *United States*, 110 S. Ct. 2528 (1990), and the Clean Air Act Amendments of 1990.

Respectfully submitted.

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Solicitor General

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